United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

To be argued by
JAMES A. CUDDIHY

76-1088 7

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

BENNY ONG, WONG WAH, TOM HOM and ALBERT YOUNG,

Defendants-Appellants.

On Appeal from The United States District Court for the Southern District of New York

REPLY BRIEF FOR DEFENDANT-APPELLANT, TOM HOM

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POINT I

THE JURY DID NOT RECEIVE WHOLLY CORRECT BUT RATHER INCORRECT, INADEQUATE AND CONFUSING INSTRUCTIONS FROM THE COURT.

Significantly, although three other lengthier and more detailed briefs were filed by other defendants, the Government brief immediately attempts (Point I, p. 10) to attack the truly unanswerable arguments of Hom set forth in his brief, in an obvious effort to remedy its most glaring deficiency and weakness. (Def. Hom Br. Points I and 2, 8-12) It very properly and necessarily refers to the exception taken to the portion of the Court's charge and raised by counsel herein to the fact that the Court had failed to instruct the jury that if they found the existence of two conspiracies, mere knowledge on the part of a defendant in one such conspiracy of the existence of the other did not constitute proof of the single overall conspiracy charged (Govt. Br. footnote, 10-11).

The exception made was clearly noted and approved of by the Court most specifically, concisely and beyond peradventure of a doubt in the following language: "May I say now, just to save time, that

any exceptions taken by any defendant's attorney will inure to the benefit of all of you". (Tr. 1176) It would seem that the Court's statement (similarly made elswhere and often throughout the trial) adequately protects all of the other defendants. The Court, in its charge stated in part as follows:

> "Proof of two separate and independent conspiracies is not proof of the single overall conspiracy charged in the indictment. Thus, if you were to find based on the evidence in this case that defendant A conspired with defendant B and also that defendant A conspired with defendant C and that both conspiracies had the same unlawful objective, the Government would have failed to prove the existence of a single overall conspiracy and you must find the defendants not guilty of the conspiracy charge in Count 1." (Tr. 1140-1142)

Directly and happily for Hom, the Government readily admits that "the charge as given was not fully consistent with the settled law of this Circuit", citing several cases and then adding gratuitously as follows: "but it was far more thorough than other more recently approved formulations" (emphasis supplied) (Govt. Br. 13) (whatever "more recently approved formulations" means). In fact the understatement is better phrased that the charge was not consistent at all with the settled law of this Circuit.

It is stated weakly and unconvincingly that "the last two paragraphs of the above quoted portion of Judge Brieant's charge thoroughly refute Hom's current contentions". Of course, no authority is given for this egregious statement, patently false on its face as even a cursory reading would indicate. In the last paragraph of the Government brief with reference to Point I (Govt. Br. 13-14) in a hopelessly desperate attempt to salvage the crumbling edifices of its jerrybuilt structured argument, the Government, in effect, argues Hom's case and is quickly hoist upon its own petard. The Government states that on five occasions Hom and Ong jointly met the investigators. With this statement of fact Hom has no objection. But, indeed, the Government confirms (Govt. Br. 13-14) that on two other occasions Ong, Wah and Hom appeared <u>separately</u> at the same restaurant <u>within minutes</u> of one another. Why not seconds, days, hours or weeks? <u>Separately</u> means not together, parted, unjoined, etc. precisely as meant by the Court and the Government. Hom and Wah were never part of a conspiracy anymore than Young and Hom, or Wah and Young were.

Of what possible significance can it be that Ong called the defendants by telephone and thereafter advised the I.N.S. investigators that Wah and Hom would arrive shortly. Together? Separately? When exactly? (Govt. Br. 13-14). This is ridiculous and arrant nonsense. It is a latent and futile move by the Government to create a conspiracy that never existed. The Government is painfully aware that it has a will-of-the-wisp. The facts are that there is nothing in the record that Hom was ever together with Young and Wah. In fact, he never was.

For the concise and pithy state of facts:

(a) Hom and Wah - no conspiracy

(b) Hom and Young - no conspiracy

(c) Young and Ong - no conspiracy

(d) Young and Wah - no conspiracy

(e) Hom and Ong - proof of meetings - substantive acts - five occasions.

Judge Brieant was really not as thorough as the Government would give him credit for. His charge, however, was far from complete. Almost and finally helpful (see particularly Para. 2 and 3 of Tr. 1142), it simply collapsed along the road. A ready

interpolation of Ong for "A" and Wah for "B", and Hom for "C" indicates the result which the jury should have reached if the Court completed its instructions and if thence the Court had allowed the conspiracy count to go to the jury If Ong conspired with Wah and Ong with Hom and both conspiracies had the same unlawful objective, the Government would have failed to prove the existence of a single overall conspiracy and the defendants must be found not guilty of the overall conspiracy (Tr. 1140-1142).

Since Judge Brieant failed to complete his instructions to the jury and to charge that to convict Hom he must be a member of the conspiracy charged, his instructions were deficient and the conviction must fail. It is axiomatic that if the conspiracy fails, all must fail because it is impossible for a court to subjectively assume the role of a jury and to determine how a jury would find had there been no overwhelming intimidating single conspiracy charged. The defendant did not draft the indictment and charge the sweeping conspiracy which it is presumed the Government intended to overwhelm the

jury. The failure of the Government to prove the overall conspiracy is singularly its own.

To reply to the Government's arguments at Page 13 of its brief, the case of United States vs. Bynum, 485 F. 2d 490, 497 (2d Cir. 1973), vacated and remanded on other grounds, 417 U.S. 903 (1974), was one involving a single conspiracy and the issue was on the familiar so-called "all or nothing charge", i.e. if the Government failed to prove existence of only one conspiracy, it must find the defendants not guilty. Ergo, in a case of this type (Bynum) when the jury is convinced that two are absolutely guilty, and even if it agrees that there was a failure to prove all guilty, it might nevertheless find all guilty under the charge so that the two obvious malfactors do not go free. So the Courts reason.

In Bynum, supra, the other portions of the charge made it clear, however, that if each of the defendants was not a knowing party in a single conspiracy, he must be acquitted. The Court referred to the charge below and stated in part on Page 497,

"...Judge Pollack meticulously charged the elements and characteristics of the single conspiracy and

summarized the Government's evidence as to each defendant and the evidence, if any, of each defendant who presented testimony.* This above takes up 18 pages of the record. The contention therefore that the charge was prejudicial and in violation of Borelli and Kelly is unsupportable..." * (herein Judge Brieant must be found wanting.)

The case of United States vs. Cohen, 518 F.2d 727, 735 (2d Cir.), cert denied sub nom, held that the evidence supported the jury's findings that there was a single conspiracy although there may have been other fraudulent activities involved. In the case of United States vs. Tramunti, 513 F.2d 1087 (2d Cir.) cert. den. 423 U.S. 832 (1975) the charge was virtually the same as that in the case of Bynum, supra, except that the Court studiously avoided that part of the charge challenged in Bynum, supra, which stated in part as follows:

> "Proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges. What you must do is determine whether the conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, you must acquit. However, if you are

> satisfied that such a conspiracy existed, you must determine who were the members of that conspiracy.
>
> If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, then you must acquit that defendant. In other words, to find a defendant guilty you must find that he was a member of the conspiracy charged in the indictment and not some other conspiracy."

and then referring to the landmark case of United States vs. Kotteakos, U.S. 328, U.S. 750, 66 St.Ct. 1239, 90 L.Ed. 1557 (1946):

> "and in that situation where only separate and distinct conspiracies are shown (and that here is the fact) and the single conspiracy alleged is not proven, acquittal is required and the request must be given." (P. 1108)

Judge Brieant simply failed too in the aspects of instruction and he failed to instruct the jury that if they found the existence of two conspiracies mere knowledge on the part of a defendant in one such conspiracy of the existence of the other did not constitute proof of the single overall conspiracy charged. (Tr. 1175-1176) It seems almost impossible to conceive of a case in which this instruction was so desperately and certainly required. Witness the Young dismissal, and the failure to establish a Hom-

Young or Hom-Wah connection.

In the case of Kotteakos, supra, mention of which the Government quite carefully avoids, the Court was highly critical of the Government's theory that error presented by a variance in proof of conspiracy is unsubstantial and harmless and pointed out that in a single conspiracy charge, the burden of defense is vastly different not only in the preparation of trial but also in looking out and securing evidence affecting other defendants to prevent its transferrence as "harmless error" or by psychological effect in spite of instructions for keeping separate transactions separate.

With Young's conspiracy dismissed, the Court stated that the defendants Ong, Wah and Hom each met with the investigators at the Hong Kong Bar on two separate occasions (Tr. 1149) clearly misleading the jury since even the Government concedes that the three did not meet together (emphasis supplied). How completely, frustratingly and hopelessly confusing for a jury troubled as it might be, under any circumstances, in attempting to understand the ephemeral and paradoxical concepts of legal conspiracy!

Confusion of the jury was a cause of monumental concern to the Supreme Court in Kotteakos, supra, and it is respectfully submitted it should be here also. It is devastatingly and painfully apparent that the charge, besides being confusing, was simply insufficient and ineffective.

As was said in the Kotteakos case:

> "The indictment charged a single conspiracy only; the proof showed more than one; the instructions told the jury erroneously that on the evidence they could find the defendants guilty of a single confederation; must find that each defendant joined it, in order to convict; must consider the evidence as to each separately on this phase; but, once satisfied concerning that, could attribute to each one found to be a member any act done by any other co-conspirator in furtherance of 'the scheme' as an overt act, again in obvious error; and in neither case, of course, was there precaution to keep separate conspiracies separate." (Emphasis supplied)

The Supreme Court, in language which would be apt for this case, and in showing its obvious and real concern for the sweeping single conspiracy charge, stated in part:

> "There are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some: When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call

for use of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.

Criminal they may be, but is is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But, our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth."

POINT II

THE SENTENCE IMPOSED ON HOM WAS IMPROPER AND WHOLLY UNREASONABLE.

The Government in attempting to answer Hom's Point III, agrees that the sentences were concededly not slaps on the wrist. Herein Hom is not concerned with the other sentences, but only with his own. Hom readily admitted that normally a sentence within the term authorized by the statute is invulnerable to attack on appeal. (Def. Hom Br. 12) However, Hom argues that under the Second Circuit Judicial Council's new sentencing procedures, it would have

been virtually incredible and inexplicable for a United States District Court Judge to impose such a sentence on Hom (Def. Hom Br. 13-14 and Other Materials Cited therein, 17-26).

Comment must be also made with reference to Judge Brieant's statements (Minutes of Sentencing, February 11, 1976, at 35-36) which must be indicative of the state of his mind on sentencing day, in particular:

> "... It is a basic rule, established by Congress, that thou shalt not bribe Federal officials, and the giver of a bribe is just as evil as the taker of a bribe."
>
> "... We simply cannot permit, no matter how much we might feel sympathetic, no matter how we would like to accommodate the desires of defendants and their attorneys - we cannot permit commonplace local bribery of precinct policemen to condone gambling to slop over, in effect, into the administration of the Federal Government, and this Court must regard and does regard the bribery of Immigration officials as being a much more serious moral lapse than what has been talked about in connection with the Nadjari situation.
>
> "...The Court wishes, by imposing sentence, to make it clear to anyone else who is considering bribing an Immigration official or anybody else, that this is a serious felony and carries a substantial penalty". (Minutes of sentencing, Feb.11, 1976, at 35-36).

It would indeed be difficult to persuade the Governor of a state, a City District Attorney, State Attorney General or Judge, or the Superintendent of the New York State or Connecticut State Police that it is a much more serious crime to bribe any Federal official, e.g. an I.N.S. agent or a customs clerk.

Most of us have been blissfully unaware that local bribery of precinct policemen is so mild an offense (state and local statutes and ordinances to the contrary) and only becomes serious when it "slops over" into the administration of Federal Government. If this contention is subtle, it is also appalling.

Indeed, the sentencing was obviously tainted by the Nadjari syndrome, wherein some courts are wont (irrespective of the propriety or non-propriety or accuracy or inaccuracy of the statement) to denigrate the efforts and results of the aforesaid Special Prosecutor. This is a matter of concern herein only because it has quite obviously worked to the detriment of Hom. No other explanation or inference of the sentence seems rational.

Hom does not suggest that all defendants previously sentenced under existing procedures are entitled to resentencing under the new procedures. It is rather his position that this is an extraordinary case and a most extraordinary sentence and there is nothing in law to prevent the Second Circuit Court of Appeals to remand for more appropriate relief.

It is stated on Page 49 of the Government's brief that one of the principal objectives of the new rule was to have the trial judge state his reasons and that his objective was fully satisfied in this case. The Government adroitly avoids reference to the other objectives of the new sentencing procedures (Def. Hom Br. 13) and for an eminently clear reason. The reason is that the other objectives were not, in any way, satisfied in this sentencing.

Further, it is respectfully submitted that this reason as stated in the Minutes of Sentencing, February 11, 1976, at Page 35-36, would appear to be hopelessly inadequate and lacking in justification for the severity of the sentence.

POINT III

ALL RELEVANT ARGUMENTS RAISED IN ALL BRIEFS FOR THE OTHER CO-DEFENDANTS ARE INCORPORATED BY REFERENCE.

CONCLUSION

Hom therefore requests that he be acquitted on Count One, among other reasons, because of failure of the Court to properly and adequately instruct the jury on the single conspiracy count. Hom further requests that his conviction on all of the remaining substantive counts be reversed for a new trial on the ground that the conviction was, in this case, tainted by the improper instructions and the ultimate conviction of conspiracy and that it would therefore be impossible for the Court to speculate as to the verdict of a jury had the conspiracy instructions been properly given.

Alternatively, Hom requests that the case be referred back to the District Court for resentencing

more in spirit and compliance with the new sentencing procedures approved by the Second Circuit Judicial Council, irrespective of whether they have been formally adopted by the District Courts at the time of this Court's decision.

Respectfully submitted,

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COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Respondent - appellee

- against -

Benny Ong et al.
Defendants-appellants

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James A. Steele *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
310 West 146th Street, New York, New York
That on the 17th *day of* May *19*76 *at* see attached

deponent served the annexed Reply Brief
see attached *upon*

the Attorneys *in this action by delivering a*[2] *true copy*[s] *thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.*

Sworn to before me, this 17th
day of May *19* 76

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

James A. Steele
JAMES A. STEELE